

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 2458 of 1994

For Approval and Signature:

Hon'ble MR.JUSTICE J.N.BHATT

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

DEVSANKAR AMBALAL JANI

Versus

STATE OF GUJARAT

Appearance:

MR DEVANG NANAVATI WITH MR SANJIV DAVE for the petitioner
MR K.C.SHAH, AGP, Respondent No. 1
Respondent No. 2 served.

CORAM : MR.JUSTICE J.N.BHATT

Date of decision: 16/07/96

ORAL JUDGEMENT

In this petition under Article 227 of the Constitution of India, the question has arisen as to whether the survey settlement of land revenue undertaken by some authority and accepted by the State Government would become survey

settlement under Bombay Land Revenue Code and what is the interpretation and the applicability of the provisions of section 73-A, 117R and section 216 of the Bombay Land Revenue Code, 1879 (BLR Code) are the main questions which have come to the surface for examination and adjudication.

The petitioners have questioned the legality and validity of the order passed in revision by the respondent No.1, State of Gujarat, recorded, on 30.11.93, confirming the order of the Collector passed, on 15.9.92, directing the petitioner to hand over possession of agricultural lands bearing survey Nos.655 & 656 (disputed lands) on the ground that there is breach of the provisions of section 73-A and 73-AA of the BLR Code.

The land admeasuring 9 acres and 30 gunthas and 0.37 gunthas bearing survey Nos.655 and 656 respectively situated, at Moje Mou, Taluka Idar, District Sabarkantha, came to be surveyed and settled in the year 1934 by the Erstwhile State of Idar. The respondent No.1, State of Gujarat, issued a notification in exercise of powers conferred under section 73-A of the BLR Code applying the said section to the land situated within the area specified in the Schedule. The notification came to be issued on 4.4.61.

The disputed lands originally belonged to one Patel Mohanbhai Kalidas, who in turn sold it to one Tribal Shri Surjibhai Gambhirsinh, by way of oral contract in 1962. The transfer entry came to be recorded in the record of rights by virtue of entry No.389, dated 17.5.62. The predecessor in title of the petitioner had taken the possession of the disputed lands on 26.2.71. Thereafter, on 21.9.71, an application for permission to sell the said lands was made to the Revenue Department. The Deputy Collector concerned had replied that there was no need to have the previous permission contemplated under section 73-A of the BLR Code.

The original petitioner, Devshankar Ambalal Jani, died during the pendency of the proceedings and therefore his heirs, two sons and brother are joined in this petition. The original petitioner had purchased the land from one tribal Shri Surjibhai Gambhirsinh by a registered sale deed dated 16.11.73. The Deputy Collector had issued a notice for sou motu revision and fixed the hearing of the proceedings on 18.7.84 and after hearing decided to drop the proceedings. Later on, on 29.7.89, the Collector had sou motu taken the order dated 9.8.84 in revision who held that there was some violation of the provisions of

section 73-A of the Bombay Land Revenue Code and remanded the case to the Deputy Collector concerned. After the remand, the Deputy Collector by his order dated 26.9.90, recorded the conclusion that there is violation of the provisions of section 73-A of the BLR Code and therefore transfer by tribal to the original petitioner is illegal and therefore directed to restore the possession to the respondent Tribal. Being aggrieved by the said order, the original petitioner carried the matter in appeal, but unsuccessfully. The Collector by his order dated 15.9.92 confirmed the order of the Deputy Collector. Thereafter, the original petitioner filed a revision before the State of Gujarat and the revisional authority by its order dated 30.11.93, confirmed the orders of the Collector and the Deputy Collector.

The important question which falls for appreciation and adjudication is whether the settlement of survey of land revenue made by the Erstwhile State Idar, prior to the introduction of the provisions of Bombay Land Revenue Code could be said to be a survey settlement under the BLR Code. The contention of the petitioners is that the survey settlement of land revenue carried out by the authority of the Erstwhile state of Idar came to be accepted by the State Government and it has become a survey settlement under the Bombay Land Revenue Code. The contention of the respondent authority is that the survey settlement of land revenue made prior to the introduction of the Bombay Land Revenue Code cannot be said to be a survey settlement under the Bombay Land Revenue Code. However, there is consensus on one point. If the survey settlement of land revenue carried out by some authority and accepted by the State Government is held to be a survey settlement under the Bombay Land Revenue Code, then, in that case, a notification issued under section 73-A of the BLR code will not apply. Notification No.LND-3961/41509-G dated 4th April, 1961 came to be published by the respondent No.1, State of Gujarat, exercising its powers of section 73-A of the BLR Code. By virtue of the said notification, the provisions of section 73-A shall be applicable to all those villages in the scheduled area in the State of Gujarat in which survey settlement under the Bombay Land Revenue Code has not been introduced and to which the provisions of the said section 73-A have not been made applicable before the issue of the notification. It also exempts from the operation of section 73-A, all persons not being members of a Scheduled Tribe, holding lands in the villages to which the said section 73-A is declared to be applicable by the notification. The area where the disputed land is situated is shown in the scheme about which there is no

dispute . It is in this context, the aforesaid contention that the notification will not apply to the disputed land as survey settlement had already been effected long before by the Erstwhile State of Idar. The contention of the petitioner is not accepted by the authorities below after remand. Therefore, the question would arise as to whether the said notification will apply to the disputed land or not for which it would be necessary to examine as to whether the survey settlement carried out by the authority before the introduction of the Bombay Land Revenue Code could be said to be survey settlement under the Bombay Land Revenue Code or that fresh survey is required to be made for attracting the rigours of the provisions of section 73-A of the BLR Code. With a view to appreciating this aspect which is countenanced by the State of Gujarat, a few relevant provisions would be necessary to be referred to.

The admitted fact is that the disputed land was forming part and parcel of Erstwhile State of Idar and survey settlement for the land revenue had been carried in 1934. The question, therefore, requires consideration and adjudication is as to whether the survey settlement made by the Erstwhile State of Idar is a survey settlement under the Bombay Land Revenue Code or not. For that, it will be necessary to refer to the provisions of section 3(3) of the BLR Code which provides as to what is the survey settlement. It reads as under :

"(3) "Survey settlement"; "Survey settlement" includes a settlement made under the provisions of Chapter VIIIA;"

It could very well be seen that survey settlement defined under the Bombay Land Revenue Code is inclusive and it includes a settlement made under the provisions of Chapter VIIIA. The definition of survey settlement as contained in section 3(3) is not to be interpreted in its restricted, narrower or orthodox sense so as to exclude the survey settlement made by an authority under the provisions of other law. If such survey settlement though not made under the code is accepted by the State Government, it is to be treated as the one made under the Bombay Land Revenue Code. It will be now interesting to refer to the provisions of Chapter VIIIA of the Bombay Land Revenue Code. This chapter deals with the provisions of assessment and settlement of land revenue of agricultural land. What will be the position quo the survey settlement made prior to the introduction of the Bombay Land Revenue Code, is provided in section 117-R which reads as under:

"117-R. Settlement made before this Act to be
deemed under this Chapter --

All settlement of land revenue, heretofore, made
and introduced and in force at the date of the
commencement of the Bombay Land Revenue Code
(Amendment) Act, 1939, shall be deemed to have
been made and introduced in accordance with the
provisions of this Chapter and shall,
notwithstanding anything contained in section
117E, be deemed to continue to remain in force
until the introduction of a revision settlement."

It is explicit from the plain perusal of section 117-R
that the settlements made before the introduction of the
Bombay Land Revenue Code are to be deemed to be
settlement under Chapter VIIIA. All settlements of land
revenue undertaken and introduced and in force at the
date of commencement of Bombay Land Revenue Code
(Amendment) Act, 1939 are deemed to have been made and
introduced in accordance with the provisions of Chapter
VIIIA. Not only that, there is further provision which
is very important. Such deemed survey settlement made
before the Act, notwithstanding anything contained in
section 117-E shall be deemed to continue to remain in
force until a revised settlement is introduced.

In Chapter VIIIA of the BLR Code, provisions are made for
assessment and settlement of land revenue of agricultural
land in section 117C to 117R. In section 117-E, the term
of settlement is provided. There is a provision that the
settlement shall remain in force for a period of 30 years
under section 117E provided that in the case of any
particular settlement, it is open for the State
Government to direct reduction of period less than 30
years. The State Government is also empowered to extend
the term of the settlement for such period as it may
think fit. Section 117-E reads as under :

"117-E. The term of settlement --

A settlement shall remain in force for a period
of 30 years:

Provided that in the case of any particular
settlement, the State Government may, for reasons
to be recorded, direct that the settlement shall
remain in force for any period less than 30
years:

Provided further that, when in the opinion of the
State Government a revision settlement is

inexpedient, or when the introduction of such settlement has, for any cause, been delayed, the State Government may extend the term of the settlement or the time being in force for such period as it may think fit."

Section 117R has overriding effect for the purpose of term of the settlement in respect of such settlement of land revenue which came to be made and introduced and remained in force at the date of commencement of the Bombay Land Revenue Code (Amendment) Act, 1939. A combined reading of the provisions of section 73-A and section 117-R, it becomes explicit that the survey settlement of land revenue carried out by some authority before the introduction and remaining in force at the date of commencement of the Bombay Land Revenue Code (Amendment) Act, 1939 doubtlessly becomes the survey settlement under the Bombay Land Revenue Code.

It is in the aforesaid factual scenario and the legal context, the notification in question dated 4th April, 1961 would not apply to the land in question. The notification issued under section 73-A of the Bombay Land Revenue Code itself says that the provisions of section 73-A shall be applicable only to those villages in scheduled areas in the State of Gujarat in which survey settlement under the Bombay Land Revenue Code has not been introduced whereas on the factual analysis and the assessment of facts, this Court has found that there was already survey settlement of land for land revenue carried by the Erstwhile State of Idar in 1934 and it was in force at the time when the Bombay Land Revenue Code (Amendment) Act, 1939 came into force. Not only that the respondent No.1 State of Gujarat had accepted the said survey settlement of land revenue and has been accordingly recovering the assessment under the Bombay Land Revenue Code. Thus, the survey settlement of land for the purpose of revenue and assessment carried by the erstwhile State Idar in as early as 1934 which remained in force at the commencement of the Bombay Land Revenue (Amendment) Act, 1939 came to be accepted by the State Government and accordingly the assessment is made and revenue is recovered in respect of the disputed land. It is in these circumstances, the survey settlement of land carried out by authority of the Erstwhile State Idar and accepted by the State of Gujarat, undoubtedly, and obviously would become the survey settlement under the Bombay Land Revenue Code and therefore, the aforesaid notification dated 4th April, 1961 under which the impugned orders came to be passed would not apply and resultantly the impugned orders cannot be sustained.

The object of Section 73A is to protect members of scheduled tribes against exploitation. The provision aims at to put restriction on transferability of occupancy in certain tracts and area where such protection was necessary. It is true that section 73A provides that a notification can be issued under the section in respect of any tract or village in which original survey settlement is not introduced. The area of operation of the section is clearly demarcated. Thus, the section specifies the area in which it can be brought into operation and the person or class of persons in respect of whom it can be brought into operation. Thus, a prohibition injected against transfer of land in any tract or village to which notification is issued under Section 73A is to provide protection to persons belonging to scheduled tribes and in certain tracts and areas. However, notification under Section 73A issued by respondent No.1-State of Gujarat dated 4.4.1961 clearly ipso facto says that it shall apply to all those villages in the scheduled areas in the State of Gujarat in which survey settlement under the Bombay Land Revenue Code has not been introduced and to which provisions of section 73A have not been made applicable before issue of notification. Since survey settlement in respect of the disputed land situated in Bhiloda in Sabarkantha district had been made in, as early as, in 1934, the said notification will not apply to the disputed land. Despite this, the impugned orders came to be passed exercising powers under section 73A relying on the said notification. The respondent authorities lost sight of this proposition that survey settlement had been made by the authority of the Erstwhile State of Idar and it came to be accepted by respondent No.1-State of Gujarat. Consequently, it becomes survey settlement under the Bombay Land Revenue Code, with the result, the impugned order of the Deputy Collector dated 26.9.1990 wherein it is held that there was violation of section 73 A and, therefore, the transfer is held to be illegal, is itself illegal and it is wrongly confirmed by the Collector in appeal so also by respondent No.1 in revision. Thus, the order of the Deputy Collector dated 26.9.1990 which came to be confirmed in appeal No. 127 of 90 on 15.9.1992 by the Collector and lastly which came to be confirmed by respondent No.1 in revision on 30.11.1993 is not only unjust but is perverse and illegal requiring interference of this court in this petition under Article 227 of the Constitution of India.

Attention of this court is also invited by the learned counsel for the petitioner that the same respondent-authority-Deputy Collector in a similar set of

circumstances in the case of adjoining land to the disputed land has held that the notification does not apply. A copy of the said order is produced on record. Reference of this matter is also made in the impugned orders. There is no dispute about the fact that in the matter of adjoining land being land case No. 19/89 (case of the petitioner being No. 20/89) in respect of land bearing No.. 653 in the same set of circumstances , it is concluded that there is no violation of provisions of section 73 A and there was no application of the said notification. This aspect has not been explained by the respondents for the reasons best known to them.

The view of this court while interpreting the text of the notification in question and the provisions of section 73A is supported by the proposition laid down by the Division Bench of this court in the case of Ahmedbhai Memon vs. State, 13 GLR 354. It is held in the said case that section 73A of the Code was introduced in order to give such power to the Collector to put a restriction on the transferability of occupancy in certain tracts and areas where such protection was necessary. As the section provides that a notification under section 73A can be issued in respect of any tract or village in which original survey settlement is not introduced, the area of operation of the section is, clearly, demarcated. It means that the section specifies the area in which it can be brought into operation. Thus, if notification is issued under section 73A in respect of certain area or tract occupancy of the land in that area and tract to which the notification applies, obviously, would not be transferable without previous sanction of the Collector which in the absence of notification, would have been transferable without any restriction or fetter. The original petitioner purchased the disputed land from the tribal by a registered sale deed dated 16.11.1973. It is true that it was transferred by a tribal to a non-tribal. It is also true that it was without the previous sanction of the Collector. If the provisions of section 73A are not applicable to the land in question, obviously no previous sanction of the Collector was required. Under section 73A, it is very clear that occupancy in respect of the land is transferable and heritable. Inhibition is incorporated by the provisions of sections 73A and 73AA against transferability. If notification issued thereunder applies in the present case, as observed hereinbefore, to the disputed land, though purchased by a non-tribal from a tribal, no previous sanction of the Collector was required in view of the fact that provisions of section 73A and resultant notification thereunder did not apply. The decision in

Ahmedbhai's case (supra) supports the view taken by this court.

In T.N.Dolatsinghji vs. State of Gujarat,AIR 1980 SC 59, the apex court has held that the decision of this court in State of Gujarat vs. Ibrahim Akbarali,14 GLR 761 is just and correct. In that case, the Division Bench of this court has, clearly, held that the definition of "survey settlement" given in sub-section (3) of section 3 of the Bombay Land Revenue Code is an inclusive definition. It does not define the expression 'survey settlement' as meaning one and one only carried out under the provisions of the Bombay Land Revenue Code. It is further held that the narrow view of the matter cannot be taken so as to lay down that alienated villages contemplated by sub-section (2) of section 216 of the Land Revenue Code were alienated villages merely of British India and not alienated villages which in course of time came to be a part of the State of Bombay. In other words, the view of this court while interpreting provisions of section 73A coupled with the provisions of section 3(3) of the Bombay Land Revenue Code for survey settlement if carried out by some other authority not under the provisions of Bombay Land Revenue Code and if it was accepted and acted upon by the State Government, it becomes one under the Bombay Land Revenue Code, is fully reinforced. The apex court in Dolatsinghji's case (supra) has taken the same view. It will also be interesting to note that in that case, it is clearly found by the apex court that survey settlement had been made in the State in the year 1936 and the land revenue payable by the Jagirdar was assessed in the year 1948 when the Land Revenue Code was applied by the province of Bombay to the land in question. Of course, there is no dispute in the present case about the fact that survey settlement had been made by the Erstwhile Idar State. There is also no dispute about the fact that it was in force at the commencement of the Bombay Land Revenue Amendment Act, 1939, with the result that notification in question dated 4.4.1961 identifying applicability of the provisions of section 73A to the lands areas and tracts shown in the Schedule wherein survey settlement was not introduced will not have any survival value. Despite this clear proposition, the authorities below have concurrently and consistently misread the provisions, misunderstood the object and misconstrued the relevant provisions of the Bombay Land Revenue Code while passing the impugned orders cancelling the sale in favour of the original petitioner and directing resumption of the land. The said orders are not only unjust and unreasonable but are perverse and illegal which have

culminated into gross miscarriage of justice which needs to be put in a correct legal shape by exercising extraordinary, discretionary and equitable powers of this court under Article 227 of the Constitution of India while allowing this petition.

The contention that orders are also vulnerable for exercise of powers under section 211 of the Bombay Land Revenue Code after unreasonable period of time of 16 years, need not be examined in view of the aforesaid view of the court on the point of applicability and interpretation of provisions of section 73A of the Bombay Land Revenue Code which goes to the root of the matter.

In the result, the impugned order of respondent No.1-State of Gujarat in Revision No. 4 of 1993 recorded on 23.12.1993 quashing the order of the appellate authority- Collector in appeal No.127 of 1990 decided on 15.9.1992 and also confirming the order of the Deputy Collector in land case No. 20/89 decided on 26/9/1990 after remand, is quashed and set aside. The petition is accordingly allowed. Rule is made absolute to the aforesaid extent. There shall be no order as to costs.